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90-1188
No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOSEPH M. TEETER,

Plaintiff-Petitioner,

v.

STEVE SHAMBAUGH,
Acting Director of Support Services
Fairview Training Center,
Department of Human Resources,
State of Oregon,

Defendant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

1. Whether an Oregon state management employee's speech, including letters to the Oregon Governor and the Director of the Oregon Department of Human Resources, touching on waste and mismanagement at a state training center constituted speech involving a matter of public concern.

2. Whether a question of fact was raised as to whether such speech was a "substantial" or "motivating" factor in the employee's demotion.

3. Whether non-probationary management service employees in state government in Oregon have a property interest in their positions.

Parties To The Proceeding

The caption of the case in this Court contains the names of all parties to the proceeding in the Ninth Circuit Court of Appeals, whose judgment is sought to be reviewed.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Joseph M. Teeter, the Plaintiff-Petitioner herein (hereafter "Plaintiff"), prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit

entered in the above-entitled case on October 22, 1990.

Opinions Below

The original Memorandum opinion of the Ninth Circuit Court of Appeals from which this Petition for Writ of Certiorari is filed, was entered on October 22, 1990 and is attached commencing at App 1.

The Opinion of the United States District Court for the District of Oregon is attached commencing at App 11.

Grounds For Jurisdiction In Supreme Court

The date of the entry of the Judgment sought to be reviewed is October 22, 1990. App 1. Plaintiff timely filed a Petition for Rehearing with suggestion for Rehearing En Banc on November 2, 1990. As of January 15, 1990 Plaintiff has not been informed of the disposition of his Petition for Rehearing.

Jurisdiction to review the Judgment in question by writ of certiorari is conferred on this Court by 28 USC § 1254(1).

Constitutional And Statutory Provisions Involved

The constitutional and statutory provisions involved are as follows:

> First Amendment to the United States Constitution: "**Freedom of religion, speech, and press; right to assemble and petition.** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
>
> * * *
>
> 42 USC § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

* * *

Oregon Revised Statute 240.560(4): "In all other cases, if the board finds that the action was not taken in good faith for cause, it shall order the immediate reinstatement and the reemployment of the employe in the position without the loss of pay. The board in lieu of affirming the action, may modify it by directing a suspension without pay for a given period, and a subsequent restoration to duty, or a demotion in classification, grade or pay. The findings and order of the board shall be certified in writing to the appointing authority and shall be forthwith put into effect by the appointing authority."

* * *

Oregon Revised Statute 240.570(2): "An appointing authority may assign, reassign and transfer management service employes for the good of the service and may remove such employes from the management

service due to reorganization or lack of work.

"(3) A management service employe is subject to a trial service period established pursuant to rules of the division under ORS 240.250. Thereafter, management service employe may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employe is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.

"(4) Employes who are assigned, reassigned, transferred or removed, as provided in subsection (2) of this section, and employes who are disciplined or removed from the management service for the reasons specified in subsection (3) of this section may appeal to the board in the manner provided by ORS 240.560."

* * *

Oregon Administrative Rule 105-80-001 Management Service Discipline

* * *

"(3) Purpose: This rule imposes requirements for discipline of management service employees:

* * *

(c) All Other Discipline (includes demotion, suspension without pay, salary reduction, reprimand, or removal from management service):

* * *

(E) Prior Discipline, Prior Warning: No economic or any other kind of discipline is required prior to disciplinary action under this section. However, except for reprimands, warning to the employe of the agency's concerns and opportunity to correct the problem shall be given to the employe prior to discipline in those situations where the employee could not reasonably have known that the conduct was contrary to agency standards. Subsection (f) of this section sets forth provisions on prior warning.

* * *

(f) Prior Warning:

* * *

(B) All Other Discipline: Warning to the employe of the agency's concerns and an opportunity to correct the problem or deficiencies shall be given prior to the imposition of discipline unless the employe knew or should have known that

his/her conduct was contrary to the standards of the agency. However, in the case of a reprimand, the reprimand itself shall serve as the warning and no other warning shall be necessary.

(C) Form of Warning:

(i) The warning may take any reasonable form, but should be specific enough to communicate the problem as well as necessary corrective action.

(ii) One warning, in most cases, is sufficient.

(D) Further Discipline: Prior to imposition of further discipline, the employe shall have a reasonable opportunity to correct the problem.

(E) Failure to Correct: If the employe fails to correct the problem after a reasonable opportunity to do so, further discipline should be imposed as soon as possible."

Statement Of The Case

Nature of the Case and Course of Proceedings

Plaintiff filed the Complaint in this action on March 7, 1989. The action was

brought against Defendant Steve Shambaugh, the Acting Director of Support Services, Fairview Training Center, Department of Human Resources, State of Oregon. Plaintiff's Complaint alleged claims for violation of 42 USC § 1983 and Oregon Revised Statute 240.740, Oregon's former whistleblower protection statute.

In his Complaint Plaintiff alleged that he was removed from his position as Director of the Fiscal Services Department of the Fairview Training Center (FTC) and from management service for the State of Oregon as of December 31, 1988.

Plaintiff asserted that he had an expectation of continued employment in and thus a property interest in management service and that he was deprived of that property interest without due process of law. He went on to assert that his removal infringed his right of free speech

under the First Amendment to the United States Constitution in that this action was taken against him because of his expression of his opinion concerning waste and mismanagement at FTC. He also asserted that the manner of his removal and the false criticism made concerning him in connection with his removal impugned his professional competence and imposed a stigma on him and thereby deprived him of liberty without due process of law. Plaintiff also asserted that he was removed from management service for the State of Oregon in retaliation for having complained about waste and mismanagement at FTC and that thereby Defendant violated Oregon's whistleblower protection law, ORS 240.740. Plaintiff sought compensatory and punitive damages and injunctive relief.

Defendant filed a motion for summary judgment on October 20, 1989. The District Court granted Defendant's summary judgment motion in an Order filed on January 19, 1990. Judgment was filed on January 30, 1990.

Plaintiff timely filed an appeal to the Ninth Circuit Court of Appeals on February 1, 1990. The Ninth Circuit affirmed the trial court's ruling in a memorandum filed October 22, 1990. Plaintiff timely filed a Petition for Rehearing with Suggestion for Rehearing En Banc on November 2, 1990. As of January 15, 1991, Plaintiff has not been informed of the disposition of his Petition for Rehearing.

Statement Of Facts

I. Plaintiff's Management Service

Plaintiff began working for the State of Oregon in the late 1960s. He served as budget officer for the FTC from late 1984

until mid-1985. Then he served as Director of Fiscal Services for FTC from mid-1985 until he was removed from management service effective December 31, 1988.

Prior to his work at Fairview, Plaintiff had done exemplary work for the State of Oregon and had never received a poor performance rating.

II. Management Service

Under Oregon Revised Statute ("ORS") 240.570(3), a management service employee may be disciplined if the employee is "unable or unwilling to fully and faithfully perform the duties of the position satisfactorily."

Subsection (4) of that section provides that appeal may be taken from any such disciplinary action in the manner provided in ORS 240.560. Subsection (4) of ORS 240.560 states that if the action taken was not "in good faith for cause"

the employee shall be immediately reinstated.

Oregon Administrative Rule ("OAR") 105-80-001, et seq. set forth the state's administrative rules pertaining to "management service discipline". They state in part with regard to removal from management service:

> "(E) Prior Discipline, Prior Warning: No economic or any other kind of discipline is required prior to disciplinary action under this section. However, except for reprimands, warning to the employe of the agency's concerns and opportunity to correct the problem shall be given to the employe prior to discipline in those situations where the employe could not reasonably have known that the conduct was contrary to agency standards. Subsection (f) of this section sets forth provisions on prior warning. OAR 105-80-001(3) (c)(E).
>
> * * *
>
> "(f) Prior Warning:
>
> * * *

"(B) All Other Discipline: Warning to the employe of the agency's concerns and an opportunity to correct the problems or deficiencies shall be given prior to the imposition of discipline unless the employee knew or should have known that his/her conduct was contrary to the standards of the agency. However, in the case of a reprimand, the reprimand itself shall serve as the warning and no other warning shall be necessary.

"(C) Form of Warning:

"(i) The warning may take any reasonable form, but should be specific enough to communicate the problem as well as necessary corrective action.

"(ii) One warning, in most cases, is sufficient.

"(D) Further Discipline: Prior to imposition of further discipline, the employe shall have a reasonable opportunity to correct the problem.

"(E) Failure to Correct: If the employe fails to correct the problem after a reasonable opportunity to do so, further discipline should be imposed as soon as possible." OAR 105-80-001(3)(f).

A warning is to be given in "all but the most severe of circumstances". Personnel Rule 8-1-200(2)(e).

Managers were not supposed to be removed until after they had received notice of perceived deficiencies with an opportunity to correct those deficiencies after being apprised of the risks they faced if they did not improve. Their supervisors should bring deficiencies to the managers' attention in a reasonable way and they should be given a reasonable opportunity to improve before removal should be considered. The spirit of the personnel rules are to provide for progressive discipline, with discipline increasing in severity if a person is not responsive to a corrective action.

If a person receives discipline in the form of a written warning that should be placed in the person's personnel file.

Prior to Plaintiff's removal Defendant Shambaugh had placed no written warnings in Plaintiff's personnel file.

Nine months before Plaintiff's removal, but after his protected activity, a previous supervisor had expressed a concern in a memo about his performance. The memo called for improvement in 30-60 days. No later written memorandum appears in his personnel file. Plaintiff contends the memorandum itself was inaccurate.

By the time of Plaintiff's removal by Defendant, Plaintiff had received no effective prior warning or prior discipline, he was not given reasonable notice of any perceived deficiencies, nor was he given an opportunity to correct any performance problems. Defendant had decided to remove Plaintiff before he was officially named as Plaintiff's supervisor and after two weeks on the job.

III. Plaintiff's Protected Activity

In January 1986 Plaintiff was assigned the responsibility for purchasing, contracting, property management, forms and record management at Fairview. He reported to Melinda Woodward at that time and she remained his supervisor until September 1988. He was assigned responsibility for payroll in the late summer of 1986.

As part of Plaintiff's job duties he was to recommend and develop policies and procedures to his supervisor and the FTC executive staff. FTC was to convert to the new Oregon Staff Payroll System in December 1986. At the time Plaintiff was assigned responsibility for the payroll system it was in disarray. A fifty percent error rate in submission of time records was not uncommon. In September 1986 Plaintiff drafted and submitted

recommended policies, procedures and instructions for the implementation of the new state payroll system. Plaintiff became frustrated when it became apparent that the then superintendent of FTC, Jerry McGee, refused to adopt his recommendations. In March 1987 Plaintiff sent a letter of protest to Oregon Governor Neil Goldschmidt, complaining of waste and mismanagement at FTC. In September 1987 he reiterated his past advice and after his supervisor reported to him in October that it would remain unheeded he wrote to the Director of the Oregon Department of Human Resources, which Department was responsible for the management of FTC, about the problem. In that letter he said: "I have had my fill of frustration with the mismanagement and waste."

IV. Relevant Background

During the period when Plaintiff was complaining about waste and mismanagement at FTC the institution was under fire for its failure to protect its residents. The United States Health Care Financing Administration had become concerned that the institution was not in compliance with the standards which served as conditions for federal funding. It had federal auditors or "surveyors" on site to check compliance with federal standards. The FTC administration would hire additional staff to respond to the additional scrutiny. At one point federal funds were terminated. By the time Plaintiff was demoted it had been discovered that Linda Gustafson, then FTC's Superintendent, had exceeded her budget by over nine million dollars.

V. Response By The State To Plaintiff's Complaints

Plaintiff received a call from the Oregon Governor's office in response to his March 1987 complaint sometime after it was announced that the administrator of FTC, Dr. Jerry McGee, would be replaced. At that time, not knowing the direction the new superintendent would take, Plaintiff had noting to add to his memorandum. It was only after it became apparent that nothing had changed and that his supervisor and executive staff continued to fail to be responsible that Plaintiff wrote the Department Director, Mr. Kevin Concannon.

Mr. Concannon identified the matter as a "personnel problem" and assigned it to his assistant director of personnel. Tom Toombs. Mr. Toombs next met with Plaintiff and simply told Plaintiff that

nothing could be done because higher ups could choose to ignore Plaintiff's advice.

VI. Defendant's Reaction

Defendant Shambaugh first started at FTC in September 1988. For the first two weeks he spent selected half days with Melinda Woodward becoming familiar with his job as her replacement. During that first two-week period she told Defendant Shambaugh that Plaintiff had complained to either the Governor or the Department Director. She did not recommend Plaintiff's removal. She did inform Defendant Shambaugh of Plaintiff's faults and redeeming qualities. Ms. Woodward left on September 16, 1988 and Defendant Shambaugh was officially put on FTC's payroll as of October 1, 1988. Defendant Shambaugh was not officially named to the position until October 5, 1988. By the end of September he had decided to removed Plaintiff.

Grounds For Jurisdiction In The District Court

The United States District Court for the District of Oregon had subject matter jurisdiction over Plaintiff's 42 USC § 1983 claims pursuant to 28 USC § 1331(a) and 28 USC § 1343(3). The District Court had pendent jurisdiction over Plaintiff's claim for violation of ORS 240.270.

Reasons Why The Petition For A Writ Of Certiorari Should Be Allowed

I. Plaintiff's Claim For Deprivation Of His First Amendment Right Of Free Speech

The Ninth Circuit Court of Appeals affirmed the District Court's grant of summary judgment against Plaintiff's First Amendment Claim on two grounds: one, that Plaintiff's speech did not involve a matter of public concern; and two, that there was no question of fact but that Plaintiff's speech was not a substantial

or motivating factor in his demotion. The Ninth Circuit's decision conflicts with applicable decisions of this Court concerning the First Amendment. It also amounts to a marked departure from the accepted judicial procedure that a court is not to weigh the evidence in reviewing a grant of a summary judgment motion.

A. Analyzed in light of pertinent decisions of this Court, Plaintiff's speech involved a matter of public concern.

This Court has emphasized that an individual's exercise of his or her "right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." Pickering v. Board of Education, 391 US 563, 574 (1968). Stated differently, a public employee has a right protected by the First Amendment to speak if the speech can be "fairly characterized as constituting

speech on a matter of public concern." Connick v. Myers, 461 US 138, 146 (1983). To determine whether the speech in question can be so characterized, a court must look at its content, form and context in light of the record as a whole. Connick, supra, 461 US at 147-148.

In this case, the circuit court failed to follow the dictates of this Court set out in Connick and other applicable decisions and erroneously concluded that Plaintiff's speech did not involve a matter of public concern.

Contrary to the directive of this Court in Connick, the circuit court failed altogether to consider the context in which Plaintiff's speech was made. Around the time that Plaintiff was complaining about waste and mismanagement at FTC, the United States Health Care Financing Administration had been concerned that the

institution was not in compliance with the standards which served as conditions for federal funding. Federal auditors were sent to the institution to check for its compliance with federal funding standards. At one point federal funds were terminated. By the time Plaintiff was demoted it had been discovered that the then superintendent of FTC had exceeded her budget by more than nine million dollars.

In addition FTC was to convert to the new Oregon Staff Payroll System in December, 1986, just a few months after Plaintiff was assigned responsibility for the payroll system. When Plaintiff took over responsibility for the payroll system at FTC it was in disarray and a fifty percent error rate in submission of time records was not uncommon.

On numerous occasions between the time he was assigned the responsibility

for FTC's payroll system and the time Defendant decided to remove him, Plaintiff brought to his superiors' attention the waste and inefficiency caused by widespread errors in submitted timecards. For two periods of time he gave monthly reports to his then-supervisor, Melinda Woodward, noting the error rate on submitted time sheets. He drafted and submitted to his superiors policies, procedures and instructions to address this problem. When his recommendations to address this problem were ignored and after he was practically threatened to drop the issue he sent a letter to Governor Goldschmidt and later to Mr. Concannon, the director of Fairvew's parent agency, the Department of Human Resources, complaining of waste and mismanagement.

In his letter to the Oregon Governor, Plaintiff opened by stating that as a state taxpayer and state government employee he was really disturbed by the poor management he had worked under during the previous two years at FTC. He ended his letter by stating that, "I would hope that your administration's pursuits of improving state government operations would include the Mental Health Division and Fairview Hospital." In his later letter to Mr. Concannon, Plaintiff stated that, "I have had my fill of frustration with mismanagement and waste," and attached his letter to Governor Goldschmidt. In this letter to Mr. Concannon Plaintiff also wrote that,"[T]his problem [in the payroll system at Fairview] has existed for years and the enormous amount of ill will and waste of taxpayer dollars will not cease

until management performs their fundamental responsibility of publishing their payroll policy decisions, assures all employees receive training and then requires that employees/supervisors carry out their payroll policy responsibilities."

Following his letter to the Governor, an employee of the Governor's staff spoke to Ms. Woodward, then Plaintiff's supervisor, about Plaintiff's letter. Ms. Woodward admitted to the Governor's representative that there had been some snags with the FTC payroll.

Viewed in context then, Plaintiff's statements constituted speech on a matter of public concern. It was analogous to the constitutionally protected criticism by the high school teacher in Pickering concerning the Board of Education's allocation of school funds between athletics

and education and its method of informing taxpayers of the need for additional revenue.

The Circuit Court concluded that Plaintiff's letters did not involve a matter of public concern in large part because in them Plaintiff expressed a wish for a different job. App 11. The fact that the mismanagement and waste at Fairview prompted him to seek a new position does not render Plaintiff's speech a matter of no public concern. In this respect the circuit court's reasoning contradicts the teaching of this Court in Mt. Healthy City School District Board of Education v. Doyle, 429 US 274 (1977). In that case a school teacher was held to have exercised his constitutionally protected free speech right by relating to a radio station disc jockey the substance of a school memorandum relating to teacher

dress and appearance. Id., at 282. Although the plaintiff in Mt. Healthy obviously had a personal interest in the issue of a teacher dress code, this Court nevertheless concluded that he had met his burden of establishing that his conduct was protected by the First Amendment. Id., at 284. Similarly here, the fact that Plaintiff was personally impacted and frustrated by the mismanagement and waste at Fairview, which caused him to complain about it and to express an interest in another position in his letters to the Governor and the agency director, does not render his speech unprotected by the First Amendment.

The circuit court also concluded that Plaintiff's speech was not constitutionally protected because his letters were directed internally and not to the public.

App 11. This asserted rationale contradicts the holding of this Court in Givhan v. Western Line Consolidated School District, 439 US 410, 415-416 (1979), that the protection of the First Amendment extends to a public employee who communicates privately with his or her employer rather than spreading his or her views to the public.

B. The circuit court markedly deviated from the accepted course of judicial proceedings by weighing the evidence in reviewing the grant of a summary judgment motion.

Finally, the circuit court erroneously concluded the Plaintiff's speech did not provide a motivating or substantial factor in his demotion, holding instead that "his poor job performance did." App 11-12. By so ruling, the circuit court overlooked the fact that its role in reviewing grants of summary judgment under FRCP 56 is to determine whether a genuine

issue of material fact exists rather than to weigh the evidence.

Here Plaintiff presented evidence raising a genuine issue of material fact as to whether his speech was a motivating or substantial factor in his removal. Plaintiff's affidavit raised a question of fact as to whether he was removed for other than poor job performance as did the fact that Defendant requested Plaintiff be removed only two weeks after Defendant had been put on FTC's payroll which was an insufficient period for Defendant to become familiar with anyone's performance, including Plaintiff's.

In sum, Plaintiff's petition for issuance of a writ of certiorari to review the circuit court's affirmation of summary judgment against Plaintiff's First Amendment claim should be granted.

II. Plaintiff's Claim For Deprivation Of A Property Interest Without Due Process Of Law.

The circuit court concluded that the state law restrictions on removing a state employee from management service did not give Plaintiff a property right to continued management service employment. The circuit court's ruling conflicts with applicable decisions of this Court.

The Fourteenth Amendment prohibits deprivation of property without procedural due process. Carey v. Piphus, 435 US 247, 259 (1978). A public employee has a constitutionally protected property interest in continued public employment where he has a reasonable expectation or a "legitimate claim of entitlement to it." Board of Regents v. Roth, 408 US 564, 577 (1972). A legitimate claim of entitlement to a public job arises if it is "created by existing rules or understandings that

stem from an independent source such as state law." Board of Regents v. Roth, supra, 408 US at 577.

Here although the circuit court acknowledged the holding of this Court in Roth, it failed to follow that holding.

The circuit court overlooked several important administrative rules in concluding that Plaintiff lacked a property interest in management service employment with the State of Oregon. OAR 105-80-001(3)(c)(E) provides with respect to discipline of management service employees that, "except for reprimands, warning to the employee of the agency's concerns and opportunity to correct the problem shall be given to the employee prior to discipline in those situations where the employee could not reasonably have known that the conduct was contrary to agency standards." That subsection of the rule

in turn references subsection (f) which provides in pertinent part that

"(f) Prior Warning:

* * *

"(B) All Other Discipline: Warning to the employe of the agency's concerns and an opportunity to correct the problems or deficiencies shall be given prior to the imposition of discipline unless the employee knew or should have known that his/her conduct was contrary to the standards of the agency. However, in the case of a reprimand, the reprimand itself shall serve as the warning and no other warning shall be necessary.

"(C) Form of Warning:

"(i) The warning may take any reasonable form, but should be specific enough to communicate the problem as well as necessary corrective action.

"(ii) One warning, in most cases, is sufficient.

"(D) Further Discipline: Prior to imposition of further discipline, the employe shall have a reasonable opportunity to correct the problem.

> "(E) Failure to Correct: If the employe fails to correct the problem after a reasonable opportunity to do so, further discipline should be imposed as soon as possible." OAR 105-08-001(3)(f).

Personnel Rule 8-1-200(2)(e) in turn provides that a warning is to be given in "all but the most severe of circumstances."

Testimony revealed that the applicable administrative rules were interpreted to mean that managers were not supposed to be removed until after they had received notice of perceived deficiencies with an opportunity to correct those deficiencies after being apprised of the risks they face if they did not improve; that their supervisors should bring deficiencies to the managers' attention in a reasonable way and that they should be given a reasonable opportunity to improve before removal should be considered; that

the spirit of the personnel rules is to provide for progressive discipline, with discipline increasing in severity if a person is not responsive to a corrective action; and that if a person receives discipline in the form of a written warning that should be placed in the person's personnel file.

The circuit court also misapprehended or overlooked key statutory provisions applicable to Plaintiff. ORS 240.570 (3) and (4) and ORS 250.560(4) provide that an employee removed from management service for disciplinary reasons may appeal that removal and the employee shall be reinstated if the removal "was not taken in good faith for cause." This statutory limitation on the grounds for the disciplinary removal of management service employees together with the restrictions on the disciplinary removal of management

service employees contained in the foregoing applicable administrative rules created for Plaintiff a reasonable expectation of continued management service employment.

With respect to the "for cause" requirement in ORS 240.560(4) the circuit court opined that it "adds little when one considers the subjective grounds upon which removal can be predicated." App 8. It said that this was particularly true where "just cause only means that the appointing authority did not act arbitrarily." App 8, citing Civil Rights Div. of Bureau of Labor v. Williams, 280 Or 595, 573 P2d 270, 271-72 (1977). The circuit court's reliance on Williams was misplaced. First, Williams was decided before the management service category of Oregon state government employment was created in 1981. Second, the Williams

case dealt with the issue of scope of review on appeal, rather than the justification for removal in the first instance. Finally the circuit court said the "for cause" requirement is not important when one considers "subjective grounds" for removal. It is not clear why the circuit court believes that inability or unwillingness to fully and faithfully perform the duties of the position satisfactorily is not capable of objective ascertainment. The standard for performance, therefore, is objective. If the circuit court is saying that the method for assessing compliance with that standard is subjective, then it is unclear why "just cause" clauses in other contexts deserve greater credit, for there is usually a subjective evaluation of performance in those contexts as well.

The circuit court also stated that "good faith merely requires that the basis for the removal be reasonable." App 8. On the contrary, "good faith" requires an evaluation of the motivation for the action. It requires that the action not be a subterfuge for the accomplishment of an unlawful objective. Were it otherwise "good faith" would add nothing to a "good cause" requirement, or some such other standard which relates to the quality of performance of the affected employee.

Other statutory provisions overlooked by the circuit court support Plaintiff's position. ORS 240.570(3) provides that a management service employee is subject to a trial service period. This provision implies that after a person in management service completes such a trial service period, as Plaintiff had done long before his removal, he or she obtains additional

rights to continued management service employment. Further, ORS 240.570(2) provides that an employee may be removed from management service due to reorganization or lack of work. Such a delineation of non-disciplinary reasons for removal of an employee from management service buttresses the reasonable conclusion that the Oregon legislature did not intend for administrators to have unfettered discretion to remove individuals from management service.

In sum, the circuit court overlooked or misconstrued key administrative rules and statutory provisions which gave Plaintiff a legitimate expectation of continued employment in management service and thus a protected property right. This Court accordingly should grant Plaintiff's petition for writ of certiorari to correct

the circuit court's misapplication of pertinent decisions of this Court.

CONCLUSION

WHEREFORE, Plaintiff respectfully prays that his petition for issuance of a writ of certiorari be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH M. TEETER,	)	No. 90-35187
	)	
Plaintiff-Appellant,	)	D.C. No. CV-89-252-PA
	)	
v.	)	
	)	
STEVE SHAMBAUGH, Acting Director of Support Services, Fairview Training Center, Department of Human Resources, State of Oregon,	)	MEMORANDUM*
	)	FILED October 22, 1990
Defendant-Appellee.	)	

Appeal from the United States District Court for the District of Oregon Owen M. Panner, Chief District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

App 2

Submitted October 2, 1990**
Seattle, Washington

Before: KOZINSKI, O'SCANNLAIN, and FERNANDEZ, Circuit Judges

Joseph M. Teeter ("Teeter") appeals the district court's grant of summary judgment in favor of Steven Shambaugh ("Shambaugh"), the acting director of the Oregon state agency which employed Teeter. Teeter brought a 42 U.S.C. §1983 action because he was demoted from a management service position to a classified service position. Teeter argues that the district court erred because he had a property and liberty interest in his employment position and because he was demoted in violation of his first amendment free speech rights. We affirm.

** The panel finds this case appropriate for submission without oral argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

BACKGROUND FACTS

Teeter was the Director of Fiscal Services at the State of Oregon Fairview Training Center ("Fairview") from mid-1985 to December 30, 1988 when he was removed from the management position. The events leading up to Teeter's demotion are as follows. In early 1987, Teeter received memos from his supervisor outlining what was expected from him and areas in which his job performance proved deficient. Soon after receiving those memos, Teeter wrote Governor Goldschmidt a letter complaining about the poor management he had been working under. He stated that he thought about filing a stress claim, and that he wanted a new position. In late 1987, frustrated that his requests had not been granted, Teeter wrote to Mr. Concannon, who was the director of the Department of Human Resources, the state

agency responsible for Fairview. In his letter, Teeter asked to meet with the Director to discuss a change in his job. Teeter's letter also complained of management problems and that he "had [his] fill of frustration with the mismanagement and waste."

On October 4, 1988, Shambaugh wrote a memorandum in which he detailed specific complaints about Teeter's performance and requested Teeter's immediate removal from the management position. On December 29, 1988, Teeter was demoted from his management service position based on his "inability or unwillingness to fully and faithfully perform the duties of [his] position satisfactorily. [Or. Rev. Stat.] §240.570(3)."

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. §1331. We have

jurisdiction pursuant to 28 U.S.C. §1291. We review the district court's grant of summary judgment de novo. Kruso v. Int'l Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989) cert. denied, ___ U.S. ___, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990).

DISCUSSION

A. Property Interest

Teeter argues that he has a property interest in his management service position and that he was entitled to a pre-demotion hearing. A constitutionally protected property interest in government employment exists if the employee had a "legitimate claim of entitlement" to it, rather than a mere "unilateral expectation." Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). State law creates property

interests subject to fourteenth amendment due process protection. Id.

If a law substantially restricts the basis on which an employer may discharge an employee (such as for "just cause"), the law establishes a property interest in the employment. Dorr v. County of Butte, 795 F.2d 875, 878 (9th Cir. 1986). See also Allen v. City of Beverly Hills, 911 F.2d 367, 370 (9th Cir. 1990). However, if the appointing authority may determine on a subjective basis whether the employee has performed satisfactorily, the employee has no expectation of continued employment. Under Oregon law, a "management service employee may be removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." Or. Rev. Stat. §240.570(3).

A Personnel Division Rule construes the already broad language of §240.570 to mean that the appointing authority has wide discretion to remove a management service employee. It declares that "satisfactory performance" is a matter for the judgment and discretion of the appointing authority and that a determination of inability or unwillingness need only have a reasonable basis in fact. Or. Admin. R. 105-80-001(3)(c)(C)(i). That is not much of a restriction. It indicates that Teeter did not have a property interest in his employment.

Once an employee is removed for unsatisfactory performance, Oregon law permits the employee to appeal the removal, and the employee shall be reinstated if the removal was not taken in good faith for cause. Or. Rev. Stat. §240.560(4). However, the good faith requirement does

not create a property interest in the position because that requirement does not impose a significant limit on the state's discretion. See Allen, 911 F.2d at 371-72. Good faith merely requires that the basis for the removal be reasonable.

The Oregon statute also uses the words "for cause." However, in the context of management employees, that adds little when one considers the subjective grounds upon which removal can be predicated. That is particularly true when, as here, just cause only means that the appointing authority did not act arbitrarily. Civil Rights Div. of Bureau of Labor v. Williams, 280 Or 595, 573 P.2d. 270, 271-72 (1977).

In sum, the only restrictions on the board's decision to remove Teeter were that it act in a good faith and non-arbitrary manner. That did not confer upon

Teeter a property interest in his management service position. Consequently, Teeter was not entitled to a pre-demotion hearing. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493, 84 L.Ed.2d. 494 64, (1985).

B. Liberty Interest

Teeter's demotion did not deprive him of a liberty interest either. Dismissal from a government position implicates a liberty interest in reputation when the employee is dismissed for dishonesty, moral turpitude or other reasons leading to stigmata which may impair freedom to pursue future employment. Hayes v. Phoenix-Talent School Dist. No. 4, 893 F.2d 235, 237 (9th Cir. 1990). However, charges of incompetence do not implicate a liberty interest. Roley v. Pierce County Fire Protection Fist. No. 4, 869 F.2d 491, 495 (9th Cir. 1989). Since the charges

against Teeter dealt with his incompetence as a manager, the demotion did not involve a liberty interest.

Also, before an employee can claim a violation of a liberty interest, the government must make public disclosure of the charges against him. Matthews v. Harney County, Or., School Dist. No. 4, 819 F.2d 889, 892 (9th Cir. 1987). Since the charges against Teeter were not made public, he has not satisfied this element. Therefore, his dismissal did not implicate a liberty interest.

C. First Amendment Claim

For a government employee to claim that he was fired in retaliation for exercising his first amendment free speech rights, the employee's speech must involve a matter of public concern. Allen v. Scribner, 812 F.2d 426, 430, amended, 828 F.2d 1445 (9th Cir. 1987).

Neither Teeter's letter to Governor Goldschmidt nor to Mr. Concannon involved a matter of public concern. Rather, both letters asked for a job transfer. Although Teeter's letters complained about "mismanagement" and "waste of taxpayer dollars," taken in context, it is clear that Teeter wrote to the Governor and to Mr. Concannon to seek a new position. Further, both letters were directed internally, not to the public, and were little more than jeremiads by a disgruntled employee.

Also, to prove a first amendment violation, Teeter's letters must have been a "substantial" or "motivating" factor in his employer's decision to demote him. Allen, 812 F.2d 433. However, because Teeter's letters to the Governor and Mr. Concannon preceded his termination by a substantial amount of time, and Teeter

received numerous criticisms about poor job performance, there is no reason to infer that those letters provided a "substantial" or "motivating" factor for his demotion -- rather his poor job performance did. Therefore, Teeter was not fired in retaliation for exercising his first amendment free speech rights.

D. Oregon Whistleblower Statute

Teeter was not fired in violation of Oregon's whistleblower statute. Or. Rev. Stat. § 240.740. To fall within the statute's protection, Teeter must prove that he knew of specific rule violations or gross waste of funds. Teeter has not met this burden. More importantly, there is no showing that he made any disclosures of that nature during any investigation. This claim falls for much the same reasons that his first amendment claim must fall.

E. Attorney's Fees

Finally, Teeter is not entitled to attorney's fees on appeal since he is not the prevailing party in a 42 U.S.C. §1983 action.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOSEPH M. TEETER,	)	
	)	
Plaintiff,	)	CV No. 89-252-PA
	)	
v.	)	ORDER
	)	
STEVE SHAMBAUGH, Acting Director of Support Services, Fairview Training Center, Department of Human Resources, State of Oregon,	)	FILED January 19, 1990
	)	
Defendant.	)	

Defendants motion for summary judgment (#13) on all claims is GRANTED.

IT IS SO ORDERED.

DATED this 17 day of January, 1990.

/s/ Owen M. Panner
OWEN M. PANNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOSEPH M. TEETER,	)	
	)	
Plaintiff,	)	CV No. 89-252-PA
	)	
v.	)	OPINION
	)	
STEVE SHAMBAUGH, Acting Director of Support Services, Fairview Training Center, Department of Human Resources, State of Oregon,	)	FILED January 19, 1990
	)	
Defendant.	)	

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/ / /

PANNER, J.

Plaintiff, Joseph M. Teeter, brings this civil rights action under 42 U.S.C. § 1983, against defendant Steve Shambaugh, Acting Director of Support Services at Fairview Training Center. Teeter seeks damages resulting from his demotion from a management service supervisory position with the State of Oregon to a classified service position. Shambaugh moved for summary judgment. In a hearing on November 20, I granted Shambaugh's motion and said this opinion would follow.

FACTUAL BACKGROUND

Teeter was the Director of Fiscal Services at the State of Oregon Fairview Training Center (Fairview), from mid-1985, until he was removed from management service on December 31, 1988. Prior to that position, Teeter was the Budget

Officer at Fairview, from late 1984, until mid-1985.

From August, 1985, until September, 1988, Teeter's immediate supervisor was Melinda Woodward, the Director of Support Services at Fairview. In March, 1987, she wrote Teeter a memo outlining a number of areas of deficient job performance, such as not knowing the operations of units Teeter supervised, failing to anticipate and prevent problems, failing to stand behind the quality of work, and not valuing service and quick resolution of problems.

Woodward's memo gave detailed reasons for concluding that Teeter's performance was deficient. It set forth specific expectations for improvement and notified him that there would be another review in a month. The memo closed with a statement

that Teeter was expected to make substantial improvements quickly.

Less than one month after that memo, in late March, 1987, Teeter wrote a letter to Governor Goldschmidt. The letter opened with "[a]s a state taxpayer and one of your supporters and an employee of state government, I am really disturbed by the poor management I have worked under .... at Fairview." The letter said that Teeter had thought about filing a stress claim, but primarily wanted a new position where his "education, experience and abilities" would be used. Attached to the letter is a detailed explanation of Teeter's view of the management problems in the payroll system at Fairview. Teeter got a telephone call from the Governor's office in response.

Nine months after the letter to the Governor, Teeter wrote to Kevin Concannan

[sic], then newly-appointed Director of the Department of Human Resources, the state agency responsible for Fairview. That letter opens with "[m]ay I please meet with you and discuss a management service rotation ...." Attached to the letter to Concannan is the letter and attachments that Teeter had sent Governor Goldschmidt. Teeter explained management problems, and said he had his "fill of frustration with the mismanagement and waste." Teeter said he had hoped to relocate by then, but there was a great deal of competition on the job market.

Concannan deemed Teeter's letter a personnel matter, and assigned Tom Toombs, his assistant director of personnel, to handle it. Toombs contacted Teeter, and told him that it was upper management's prerogative to accept or reject Teeter's policy proposals.

In September, 1988, Steve Shambaugh replaced Melinda Woodward as Teeter's supervisor. Shambaugh testified in his deposition that during his two-week training overlap with Woodward, she may have mentioned in passing that Teeter had communicated with the Governor and Concannan, but Woodward did not say anything specific about those communications.

In October, 1988, Shambaugh wrote a letter to Mary Jo Sikorra, the Fairview Director of Personnel, detailing complaints about Teeter's performance and requesting that Teeter be immediately removed from his management service position.

On December 29, 1988, Sikorra wrote to Teeter and informed him of his removal from management service, effective December 30. The letter from Sikorra gave as the reason for removal Teeter's "inability

or unwillingness to fully and faithfully perform the duties of [his] position satisfactorily. ORS 240.570(3)." The letter detailed the supporting facts. One of the charges was that because of Teeter's mismanagement of agency accounting and auditing practices, client funds were not properly protected. A recent theft of client funds had highlighted the problem.

The letter notified Teeter of his right to be restored to classified service, and informed him of his right to a review under the agency's grievance procedure, with a copy of the procedure attached. Teeter did not appeal the decision, and accepted a classified service position.

There is a dispute involving the truth or falsity of the facts underlying the dispute between Teeter and his superiors. Teeter claims that all the

factual allegations about his managerial competence are false and blames the problems on his superiors. He contends that he was willing and able to perform his job, that the removal was not in good faith or for cause, and that he had reasonable expectation of continued employment. Teeter also claims he was stigmatized by the imputation of incompetence and the implication that his incompetence resulted in thefts from the client trust funds at Fairview. He believes that removal from management service alone is a stigma because it communicates a message that he was incompetent. In his deposition, Teeter said that the removal itself, and the "incorrect basis for it" caused the stigma.

Teeter claims that he was deprived of a property interest in his management service position and a liberty interest in

his professional reputation without due process. He also claims a violation of his first amendment free speech rights. He brings a pendent state claim for violation of the Oregon Whistleblower statute.

LEGAL STANDARDS

I. Summary Judgment

Summary judgment is appropriate if the pleadings and supporting materials show no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Evidence and the inference therefrom must be viewed in a light most favorable to the nonmoving party. T.W. Elec. Serv. v. Pac. Elec. Contractors, 809 F.2d 626, 630-31 (9th Cir. 1987). That is, if a rational trier of fact might resolve the issue in favor of the nonmoving party, summary judgment must be denied. Id. An issue is material if it

is relevant to the law governing the claim or defense. Id. A dispute is genuine if a reasonable jury viewing the evidence could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

If the moving party shows the absence of an issue of fact, the nonmoving party must go beyond the pleadings and designate specific facts showing a genuine issue. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). If the nonmoving party's claim is implausible, it must come forward with more persuasive evidence than otherwise would be necessary to show that a genuine issue exists. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (9186).

II. Constitutionally Protected Property Interest

The fourteenth amendment protects against the deprivation of property and liberty interests without due process. Carey v. Piphus, 435 U.S. 247, 259 (1978). There is a constitutionally protected property interest in employment if there is a "legitimate claim of entitlement" to it, rather than a mere "unilateral expectation". Board of Regents v. Roth, 408 U.S. 564, 577 (1972). A legitimate claim of entitlement is created by "existing rules or understandings that stem from an independent source such as state law." Id. State law establishes what is property subject to due process protection. Dorr v. County of Butte, 795 F.2d 875, 876 (9th Cir. 1986) (citing Roth, 408 U.S. at 577).

Under Oregon law, where state employees serve at the will of the appointing authority, there is no reasonable expectation of continued employment, and therefore no constitutionally protected property right. Dorr, 795 F.2d at 878. Where state law limits the grounds for dismissal, such as conditioning dismissal on a finding of cause, there is a reasonable expectation of continued employment, and therefore a protected property right. Id.

Under Oregon law, only regular employees in classified service have a property right to continued employment. Papadopoulos v. Oregon State Board of Higher Education, 14 Or. App. 130, 157-58, 511 P.2d 854 (1973). There is an exception for employees who leave a classified service position to take a management service position, and are discharged from the

management service position for reasons other than those set forth in ORS 240.555. Those employees have "bumping rights" to return to the classified service. Brady v. Gebbie, 859 F.2d 1543, 1549 n. 7 (9th Cir. 1988).

III. Oregon Public Employees Classification System

In Oregon, public employees are either in classified, unclassified, exempt or management service. ORS 240.195. ORS 240.570 governs the discipline and termination of a classified employee filling a management service position. Subsection (3) of that statute provides that:

> A management service employe is subject to a trial service period .... under ORS 240.250. Thereafter, [a] management service employe may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employe is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.

That statute also provides for appeal rights from disciplinary action taken under ORS 240.570(3). That subsection refers to appeal procedures in ORS 240.560, which require reinstatement if the action was not taken in good faith for cause. ORS 240.560(4).

IV. Constitutionally Protected Liberty Interest

In the termination from employment context, a constitutionally protected liberty interest is implicated if the employer's action "impairs a reputation or honesty or morality." Brady, 859 F.2d at 1552 (citing Matthews v. Harney County Or. School District No. 4, 819 F.2d 889, 891 (9th Cir. 1987)). There are three elements required to trigger due process protection for an employment related liberty interest claim: 1) dispute over the accuracy of the charge; 2) public

disclosure of the charge; and 3) the charge is made in connection with termination. Id. Even if a public employee cannot state a property interest claim, the employee can still assert a liberty interest claim. Brady, 859 F.2d 1553.

V. First Amendment Free Speech Rights

A public employee has a constitutionally protected free speech right if the speech can fairly be "characterized as constituting speech on a matter of public concern." Connick v. Myers, 461 U.S. 138, 146 (1983). This determination is a matter of law, based on the "content, form and context of a given statement, as revealed by the whole record". Id. at 147-148.

VI. Pendent State Whistleblower Statute Claim

The Oregon Whistleblower statute prohibits discipline against any employe

who reveals information he or she reasonably believes to show: 1) violation of any law or rule; 2) gross waste of funds; 3) abuse of authority; or 4) specific damage to public health or safety. ORS 240.740.

DISCUSSION

I. Property Interest

Teeter contends that because the Oregon statutes permit termination from management service only if the employee "is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily", and require reinstatement if the termination was without cause or in bad faith, he has a property interest under Brady. He argues that he is not an "at-will" employee, subject to termination at the unilateral determination of his appointing authority,

because the discretion of the appointing authority is statutorily limited.

Shambaugh argues that ORS 240.570 gives the appointing authority unlimited discretion to find that an employee does not fulfill the requirements of management service, and therefore Teeter has no property interest in his management service position under Brady.

I find no merit to Teeter's argument. There is no question that he has a property interest in his classified service position, under Papadopoulos and Brady. However, he has not been deprived of his classified service position.

In Dorr, the Ninth Circuit, applying California law, held that an employee had no reasonable expectation of continued employment, where the controlling statute permitted termination only for cause, but where the finding of cause was left purely

to the subjective determination of the appointing authority. 795 F.2d at 878. The court reasoned that the unilateral power of the appointing authority to determine subjectively whether an employee performed satisfactorily undercuts any expectation of continued employment that might arise if termination had to be based on objectively reasonable grounds. 795 F.2d 878. Adding the ORS 240.570 "good faith" requirement to the "cause" requirement of Dorr does not alter the outcome.

Teeter's position was one over which the appointing authority had discretion to find him unfit. The only limitation on that discretion is the right to appeal on the question of good faith and cause. Teeter has no protected property interest in his management service position.

II. Liberty Interest

Teeter's liberty interest claim is based solely on the charges of incompetence in his discharge notice, and the implication that his incompetence resulted in the theft of funds. Matthews established that the threshold requirement in an employment-liberty interest case is impairment of reputation for honesty or morality. In Roley v. Pierce County Fire Protection District, 869 F.2d 491, 495-96 (9th Cir. 1989) the Ninth Circuit carefully distinguished charges that create a stigma of moral turpitude, which infringe a liberty interest, from charges of incompetence or inability to et along with others, which do not. The court said that although allegations of incompetence may "force an individual down a notch in the professional hierarchy" and "diminish prestige", they do not permanently exclude

a person from the profession or interrupt employment for extended periods, and do not warrant constitutional protection. 869 F.2d at 495-96.

As Shambaugh points out, the only arguable implication of wrongdoing is the charge that Teeter's incompetence lead to the theft of funds. That charge cannot be labeled a charge of moral turpitude against Teeter. To accept Teeter's reasoning could turn every termination or demotion of a public employee for incompetence into a constitutional issue. Even if I accepted Teeter's argument that thee was a charge of moral turpitude, he has not shown that Shambaugh, or anyone else made a public disclosure of the charges. There is no evidence of publication, or that anyone discussed the reasons for Teeter's termination publicly, beyond statements that he was not competent for

management service. Teeter has produced no facts that could establish a liberty interest.

III. First Amendment Free Speech Rights

Teeter contends that he was terminated because he exercised his free speech rights by contacting Governor Goldschmidt and Concannan. The threshold question is whether his communications could fairly be characterized as a matter of public concern, under Connick. I find as a matter of law that they are not matters of public concern.

Teeter's letters to Governor Goldschmidt and Concannan do vaguely complain of waste and mismanagement. The letter to the Governor opens with a statement that Teeter is writing as "taxpayer". However, the question whether the communications are a matter of public concern must be based broadly on the form, content and

context of the communications. Connick, 461 U.S. at 146.

Teeter's communications were personnel matters, involving his own problems with his superiors. In both letters, he mentions directly that what he really wants is another job. Nowhere does he specifically point out any malfeasance or fraud on the part of his superiors, or any misappropriation of taxpayer property. Both letters came after he had received the memo outlining his deficiencies as a manager. It is clear by the time of the letters that he was in a serious dispute with his superiors and at risk of termination.

Even if I found that Teeter's statements relate to a matter of public concern, Teeter still has not produced facts that could prove causation. Teeter's termination came almost two years after

his letter to the Governor, and about one year after his letter to Concannan. He had already received specific and detailed warnings about his deficient performance before any of those communications. Although that warning did not specifically threaten termination, the implication is clear. Further, Shambaugh testified that he may have been vaguely aware that Teeter had communicated something to the Governor and Concannan, but he contends that he knew nothing more than that.

Teeter has not produced fact that could implicate his first amendment free speech rights. His communications did not relate to a matter of public concern.

IV. Pendent State Whistleblower Statute Claim

Teeter contends that he was terminated because he complained of waste and mismanagement in his communications to

Governor Goldschmidt and Concannan. For the same reasons that apply to the first amendment analysis above, I reject this argument.

Teeter's letters, although they complain of waste and mismanagement do not charge "gross waste" of public funds or "abuse of authority". At worst, they complain about bad management. These complaints are not covered by the terms of ORS 240.740.

CONCLUSION

I grant Shambaugh's motion for summary judgment (#13) on all claims because there is no property, liberty or free speech interest implicated, and the Oregon Whistleblower statute does not apply. There are no material facts in dispute and

Shambaugh is entitled to judgment as a matter of law.

DATED this 17 day of January, 1990.

/s/ Owen M. Panner
OWEN M. PANNER
United States District Judge